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In The Supreme Court of the United States

DANIEL BENITEZ,

Petitioner,

v.

JOHN MATA, Interim Field Office Director, Miami, for Bureau of Immigration and Customs Enforcement,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

BRIEF OF AMICI CURIAE FLORIDA IMMIGRANT ADVOCACY CENTER AND RAFAEL PEÑALVER IN SUPPORT OF PETITIONER

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INTEREST OF THE AMICI CURIAE[1]

Amici curiae Florida Immigrant Advocacy Center (FIAC) and Rafael Peñalver[2] are concerned with the possible indefinite detention of Mariel Cubans and other refugees or displaced persons who came into the United States under the Attorney General's parole authority. Amici are interested in ensuring that the Court is fully and accurately informed respecting the historical use of parole to resettle large groups of refugees in the United States. Amici are also interested in presenting to the Court the circumstances under which Cubans have emigrated to the country both before and during the Mariel boatlift. Amici believe that the circumstances under which Mariel Cubans came to the U.S. and how these circumstances are connected to the historical use of parole to resettle refugees and other displaced persons, including Cubans, are crucial to the Court's determination of this case.

SUMMARY OF THE ARGUMENT

Central to the issues in this case is the use of the Attorney General's parole authority to allow large groups of refugees[3] and other displaced persons into the United

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[1] Counsel for amici state that no counsel for a party authored this brief in whole or in part and no person, other than amici, their members, or their counsel made a monetary contribution to the preparation or submission of this brief. Letters reflecting the written consent of the parties to the filing of this brief are being filed with the Clerk of the Court concurrently with filing.

[2] The separate statements of interest of each amicus are included in Appendix A.

[3] The term "refugee" is generally used in this brief, as it was used by the U.S. Government for many years, to represent persons displaced from their country of origin or habitual residence who are afraid to return due to persecution. The term did not take on more specific legal

(Continued on following page)

States. Originally meant as a tool to cope with individual emergencies, the parole provision allowed temporary release from detention with the presumption that the release would soon expire, all the while keeping the alien "at the border" for immigration purposes. During large-scale refugee crises, however, the Government came to see parole as a flexible legal mechanism for inviting refugees to the country with the aim of resettling them. When immigration provisions or special legislation proved insufficient or cumbersome, the Government increasingly turned to parole as a substitute "initial vehicle for admission," followed almost invariably by legislation providing permanent residence. Parole was not used to keep refugees "at the border," presuming eventual re-detention. For refugees, parole was simply an alternative to other forms of admission and a first step towards permanent resettlement.

This use of parole was employed for decades to admit and resettle Cuban nationals fleeing Fidel Castro's Communist government. Indeed, the U.S. Government in many ways encouraged the emigration of Cubans to the U.S., both as a way to assist persons fleeing persecution and as a means to destabilize the Cuban government. Between 1960 and 1979, the Government provided flights and foster care to thousands of unaccompanied Cuban children; waived visa requirements for Cubans who could not obtain visas; welcomed those who arrived on a boatlift from Camarioca, Cuba; replaced this boatlift with an eight-year-long airlift, known as the "Freedom Flights," that brought over 260,000 Cubans to the country; and welcomed Cubans who came to the U.S. illegally, even hijackers. Over 690,000 Cubans emigrated to the U.S. for

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significance until Congress defined it in various acts, especially the Refugee Act of 1980.

resettlement during this period, most via parole. Through the Cuban Refugee Program the Government provided these parolees with resettlement assistance, welfare, food stamps, health care, and other benefits. With passage of the "Cuban Adjustment Act" in 1966, Cuban parolees were provided with the means to obtain permanent residence without complying with standard immigration procedures.

In 1980, Cuban nationals began to arrive in the U.S. through a boatlift from Mariel, Cuba. Efforts were made by the U.S. Government to stop the boatlift and institute an ongoing airlift in its place, much like the Freedom Flights of the 1970s. For many reasons, however, these efforts were largely unsuccessful. By the time the port of Mariel was finally closed, 125,000 Cubans had made their way to the United States. Having said that the U.S. would welcome them with "an open heart and open arms," President Carter paroled the vast majority of them into the country upon arrival. As with prior refugees, the Government used parole to further resettlement. The President called on Congress to pass special legislation recognizing a special status for Mariel Cubans and providing them with permanent residency. Within months they were provided with a full range of public benefits. And within a few years they were adjusting to permanent residence under the Cuban Adjustment Act and the Immigration Reform and Control Act of 1986.

ARGUMENT

I. Parole Has Historically Been Used to Facilitate the Permanent Resettlement of Large Refugee Groups in the United States.

With the "Act of June 27, 1952," Pub. L. No. 82-414, § 212(d)(5), 66 Stat. 163, 188 (1952), Congress first incorporated into statutory law the long-standing administrative practice of authorizing the temporary parole of aliens

into the United States when emergent reasons required entry:

> The Attorney General may in his discretion parole into the United States temporarily under such conditions as he may prescribe for emergent reasons or for reasons deemed strictly in the public interest any alien applying for admission to the United States, but such parole of such alien shall not be regarded as an admission of the alien and when the purposes of such parole shall, in the opinion of the Attorney General, have been served the alien shall forthwith return or be returned to the custody from which he was paroled and thereafter his case shall continue to be dealt with in the same manner as that of any other applicant for admission.

INA § 212(d)(5) (1952); 8 U.S.C. § 1182(d)(5) (1952). *See also* Cong. Research Serv., Library of Cong., *Review of U.S. Refugee Resettlement Programs and Policies*, 7-8 (1980) [hereinafter "Cong. Research Serv."].

Before the Act, immigration officials had used parole to cope with individual emergency situations, such as when an alien was in need of medical care. E.P. Hutchinson, *Legislative History of American Immigration Policy: 1798-1965*, at 561 (1981). Parole allowed the alien temporary entry, with the understanding that she would be redetained as soon as her purpose for entry was accomplished. Based on this past use, as well as the text and legislative history of the provision, many in Congress believed that the new parole provision was meant to apply in similar instances, on "a case-by-case basis." Cong. Research Serv., at 8; H. Rep. No. 82-1365, at 1706 (1952). The measure was not meant to authorize large-scale admissions to the country.

In time, however, Government officials came to see parole as a flexible tool for furthering the resettlement of refugees. When immigration provisions or special legislation

were unable to deal with refugee crises, the Government employed parole as an alternative means to invite refugees to the country. Under these circumstances, the Government did not use parole as it had been used before – to allow individuals temporary entry with the presumption of re-detention. The aim was to provide for permanent stay.

A. The Government Begins to Turn to Parole When Other Mechanisms Prove Inefficient or Impractical.

Up until 1980, the U.S. Government used a predominantly ad hoc approach to refugee admissions. With no specific legal provisions addressing refugee admission, refugees were originally admitted under standard immigration procedures. Cong. Research Serv., at 1-4. But these procedures were too restrictive for the immediate admission of large numbers of refugees. *Id.* Stirred by the great numbers of displaced persons in Europe after the Second World War, the Government turned to special legislation authorizing large-scale refugee admissions outside normal immigration channels. At times, as with the Displaced Persons Act of 1948, refugee admissions were charged against current or future national immigration quotas. Act of June 25, 1948, Pub. L. No. 80-774, § 3, 62 Stat. 1009, 1010 (1948). But by 1951, the over 400,000 admissions under the Displaced Persons Act had mortgaged 50% of the quotas of some countries as far as the year 2274. Cong. Research Serv., at 7; H.R. Doc. No. 84-329, at 3 (1956). At other times, as with the Refugee Relief Act of 1953, refugees were permanently resettled in the United States outside the normal quota limitations, pursuant to "special nonquota immigrant visas." Act of Aug. 7, 1953, Pub. L. No. 83-203, § 3, 67 Stat. 400, 401 (1953).

Special legislation, however, proved insufficient or impractical in the face of refugee emergencies. In such

cases, the Government turned to the parole provision as a substitute mechanism for admission. For example, through the Refugee Relief Act of 1953, Congress originally authorized 4,000 special non-quota immigrant visas to orphans adopted by U.S. citizens. *Id.* at § 5, 67 Stat. at 402. But by September 26, 1956, the 4,000 visas had been allotted while many eligible orphans remained. Hutchinson, at 562; Elizabeth J. Harper, *Immigration Laws of the United States* 511 (3d ed. 1975). Deeming the situation an emergency, the Government turned to the Attorney General's parole authority to admit the remaining orphans, 923 in all. E.P. Hutchinson, at 562. Congress provided legislation granting them the means to obtain permanent resident status a few months later. Act of Sept. 11, 1957, Pub. L. No. 85-316, § 4(d), 71 Stat. 639, 710 (1957).

Additionally, in October 1956, a Communist revolution in Hungary had displaced tens of thousands of persons, but special legislation was not possible, as Congress was out of session. Harper, at 511. In order to help relieve the crisis, President Eisenhower announced that the U.S. would accept 21,500 Hungarian refugees. Cong. Research Serv., at 9. Of these, 6,500 were to be admitted using visas still available under the Refugee Relief Act, and the remaining 15,000 were to be paroled into the country. *Id.* By 1958, approximately 38,000 Hungarian refugees had entered the United States, almost 32,000 of them under the parole provision. *Id.* That same year, Congress passed the Act of July 25, 1958 to provide permanent residence to these refugees. Pub. L. No. 85-559, §2, 72 Stat. 419, 419-20 (1958). Under the Act, the refugees were exempted from complying with certain documentary requirements for immigration. *Id.*

In both situations, special legislation had proved insufficient or unavailable, and the Government turned to parole as a substitute mechanism for admission. But, after the Hungarian incident, controversy arose over whether

the parole provision could legally be used on behalf of large numbers of refugees. Harper, at 504-11. According to the view of many in Congress, the parole statute did not provide authority "for the immigration of classes or groups outside the limit of the law." S. Rep. No. 89-748, at 17 (1965), *reprinted in* 1965 U.S.C.C.A.N. 3328, 3335. Yet over the years, both the legislative and executive branches continued to use parole for this purpose. Requiring flexibility in refugee emergencies, the Government used parole as the "initial vehicle for admission," followed by legislation providing permanent residence. Cong. Research Serv., at 1.

B. The Government Begins to Systematically Use Parole to Resettle Refugee Groups.

With the Fair Share Act of 1960, the U.S. began to regularly employ parole as a first step toward refugee resettlement. Act of July 14, 1960, Pub. L. No. 86-648, § 1, 74 Stat. 504 (1960). Responding to a refugee crisis in Europe after the Second World War, Congress explicitly authorized the Attorney General to parole under section 212(d)(5) of the INA an unlimited number of eligible "refugee-escapees." *Id.* The Act also enabled those who were paroled under its provisions to obtain permanent residence after two years. *Id.* at §4, 74 Stat. at 505. As with the Hungarian refugees, the parolees were exempted from complying with some of the INA's documentary requirements. *Id.*; Cong. Research Serv., at 10. A total of 8,260 individuals were paroled into the country under this Act. Hutchinson, at 563.

On May 23, 1962, President Kennedy authorized another parole program to assist large numbers of Chinese nationals who had fled from the Chinese Mainland into Hong Kong. 1966 Annual Report of the Immigration and Naturalization Service 7 (1966) [hereinafter "1966 INS Report"]; 46 Dep't State Bull. No. 1199, at 994 (June 18,

1962) (statement of W. Averell Harriman, Assistant Secretary for Far Eastern Affairs). By the end of 1965, a total of 15,111 Chinese refugees had been paroled into the country for resettlement. 1966 INS Report, at 7; Harper, at 513. Of these, 9,126 were granted permanent residence by the end of 1966. 1966 INS Report, at 7. Representative Francis Walter observed at the time that this use of the parole authority served as "a permanent instrumentality for taking care of unforeseen situations" by the Executive Branch. Harper, at 513.

And parole was again used to resettle over 360,000 Indochinese refugees between 1975 and mid-1980. Following Communist takeovers in Vietnam, Cambodia, and Laos, Indochinese refugees were eligible for "conditional entries." Act of Oct. 3, 1965, Pub. L. No. 89-236, § 3, 79 Stat. 911, 913 (1965) (codified at INA § 203(a)(7) (1966)). Similar in mechanism to parole, conditional entries were available in limited numbers to refugees in the Eastern Hemisphere fleeing any "Communist or Communist-dominated country." *Id.* But the number of available conditional entries was vastly exceeded by the number of refugees the U.S. chose to accept. Cong. Research Serv., at 13. The first use of parole was approved in 1975 to assist some 130,000 refugees who were evacuated from Indochina when the U.S. withdrew from Vietnam. *Id.* After admission of most of these refugees on parole, the Attorney General authorized or extended parole programs ten times – three times in 1975, once in 1976, once in 1977, three times in 1978, and twice in 1979 – each time to deal with a new and unexpected refugee emergency. *Id.* at 13-14.

Further, by this time the Fair Share Act had amended the INA's permanent adjustment of status provision to extend eligibility for adjustment to all persons "paroled" into the United States. Pub. L. No. 86-648, § 10, 74 Stat. 504, 505. Under this provision, parolees not otherwise covered by special legislation could now seek adjustment,

but only "within the numerical limitations and other restrictions imposed on immigration generally." Cong. Research Serv., at 16. To circumvent these restrictions, Congress provided Indochinese refugees with special legislation authorizing permanent residence outside of the INA's numerical limitations and exempting them from documentary requirements and other exclusion provisions. Act of October 28, 1977, Pub. L. No. 95-145, § 101, 91 Stat. 1223 (1977). Congress had again demonstrated that use of parole for refugees was meant as a step towards permanent residency in the United States.

II. Events Leading Up to the Mariel Boatlift; The U.S. Government Encourages Departures From Cuba and Welcomes Cuban Refugees Fleeing Castro's Communist Government.

Since Communism was imposed by Fidel Castro in Cuba, the United States has treated Cubans fleeing his dictatorship as refugees, welcoming them into the country for resettlement. Indeed, for many years, the U.S. Government assisted and even encouraged emigration from Cuba, using the departures to destabilize Castro's government, demonstrate the flaws of Communism, and assist those seeking freedom. Parole was an integral part of this process.[4] Between 1962 and the end of May 1979, over 690,000 Cuban nationals were paroled into the country, "the largest number of refugees from a single nationality ever accepted into the United States." Cong. Research Serv., at 13. As with the long line of refugees

[4] Because Cubans were not eligible for conditional entry – as the provision applied only to those from Eastern Hemisphere countries – the parole provision was the main mechanism available to allow Cubans into the United States. Cong. Research Serv., at 13.

that came before them, parole was used on behalf of Cubans as a means toward resettlement.

President Eisenhower began the tradition of encouraging emigration from Cuba in 1960. Immediately after Castro converted to Communism, the President instituted the Cuban Children's Program, commonly known as operation "Peter Pan," to save Cuban children from Communist indoctrination. Felix Masud-Piloto, *With Open Arms: Cuban Migration to the United States* 39-41 (1988); *On the Way: A Wave of Cuban Children*, U.S. News & World Rep., Mar. 19, 1962, at 16. Breaking with prior U.S. immigration policy, the program transported unaccompanied Cuban children between the ages of six and sixteen to the country and placed them in foster care, all at the federal government's expense. Masud-Piloto, at 39-41. Over 14,000 children entered the country through this program. *Id.* at 41.

President Eisenhower continued the tradition the following year. On January 3, 1961, the U.S. broke diplomatic ties with Cuba, leaving those within Cuba no means to acquire visas to the United States. *Id.* at 34; David W. Engstrom, *Presidential Decision Making Adrift: The Carter Administration and the Mariel Boatlift* 14-16 (1997). In response, the Government waived all visa requirements for Cubans, prompting historian David W. Engstrom to label this as "a most dramatic example of bending immigration policy to meet a United States foreign policy objective."[5] Engstrom, at 16. Although the

[5] Regarding renewed departures from Cuba after its Communist conversion, President Eisenhower stated that Americans had "opened their homes and hearts" to Hungarian refugees in the 1950s and the U.S. "will do no less for these distressed Cubans." Statement by the President on Releasing a Report on Cuban Refugee Problems, 1960 Pub. Papers 1059, ¶ 431 (Jan. 18, 1961).

statutory provision provided authority for visa waivers "on the basis of unforeseen emergency in *individual* cases," by 1962 the U.S. had issued over 400,000 visa waivers to Cubans. 8 U.S.C. § 1182(d)(4)(A) (1961) (emphasis added); *The Cuban Refugee Problem: Hearings Before the Subcomm. on Refugees and Escapees of the Senate Comm. on the Judiciary*, 87th Cong. 307-308 (1962) [hereinafter "*Hearings on Refugees and Escapees*"]. Further, because visa waivers allowed Cubans to travel to the U.S. but not stay, those who arrived with visa waivers were given parole or indefinite voluntary departure, allowing those who entered on visa waivers to stay indefinitely. Engstrom, at 16.

After Eisenhower left office, President Kennedy increased the push for emigration from Cuba. On February 3, 1961, two weeks into his term, President Kennedy directed the Secretary of Health Education and Welfare to create a "Cuban Refugee Program" to provide resettlement assistance and a wide range of social services to Cuban refugees. John F. Thomas, *Cuban Refugee Program* 1-8 (1963) (*reprinted in Cuban Refugee Programs* (Carlos E. Cortes ed. 1980)). Later that year, to resolve the fact that many Cubans with U.S. visas or visa waivers were stuck in Cuba due to the cost of airfare, the President proposed a free airlift, at a cost of $350,000 to the Government. Masud-Piloto, at 52. The President also asked Congress for additional funds to meet "unexpected refugee migration problems," reminding Congress that "this country has always served as a lantern in the dark for those who love freedom but are persecuted, in misery, or in need." *Id.*

The following year, President Kennedy specifically noted the Cuban Refugee Program's importance in the fight against Communism and raised its budget almost

900 percent.[6] Masud-Piloto, at 50-53; *see also* Thomas, at 5 (noting that budget was raised from approximately $4 million in 1961 to over $38.5 million in 1962). It was speculated that President Kennedy meant to stimulate Cuban migration in order to undermine the Cuban revolution, by creating dissent, draining human resources, and creating negative publicity worldwide. Masud-Piloto, at 50-54; Engstrom, at 21; 44 Dep't State Bull. No. 1141, at 661 (Apr. 18, 1961) (letter from Kennedy to Nikita Khrushchev noting the importance that Cuban refugees have in "assist[ing] their fellow Cubans in their struggle for freedom").

In October 1962, after the Cuban Missile Crisis, flights between Cuba and the U.S. were canceled and official emigration from Cuba was slowed. *Hearings on Refugees and Escapees*, at 306-307. The U.S. Government, however, continued to welcome any Cuban who arrived – by legal or illegal means. Between 1962 and 1965, almost 30,000 Cubans emigrated to the U.S., many on small boats. *Id.* at 4; Engstrom, at 18 & n.33. Those who escaped Cuba and fled across the Florida Straits received assistance from the U.S. Coast Guard and a hero's welcome in Miami. Engstrom, at 18. And in cases where Cubans were smuggled to the U.S. by their Cuban-American relatives, the U.S. did not enforce its laws against alien smuggling. *Staff Hiked to Handle Exile Flow*, Miami Herald, Oct. 7, 1965, at A1 ("It is an open secret that in the past exiles from here have gone into Cuba, returning with scores of new escapees. Immigration regulations have not been strictly enforced for 'humanitarian reasons.'").

[6] During its 15-year history, the program aided more than 700,000 Cubans, at a cost of more than a billion dollars to the United States. Masud-Piloto, at 54.

each of these Cubans was immediately paroled and allowed to remain, the President's actions were viewed as a "policy of unconditional welcome [that] created the belief among Cuban-Americans that the federal government would sanction any effort to expedite departures from the island." Engstrom, at 18.

In September 1965, Castro announced his plans to reopen emigration from Cuba. He declared that any Cuban citizen who wanted to leave could do so through the port of Camarioca, which he would open on October 10. *Castro Tells Rally Cubans Are Free to Leave Country*, N.Y. Times, Sept. 30, 1965, at 1; Wayne S. Smith, *The Closest of Enemies* 90 (1987). The State Department responded that any Cubans permitted to leave would be admitted to the U.S., pointing out that U.S. "policy has always been to admit bona fide refugees from Communist oppression." *U.S. Studies Proposal*, N.Y. Times, Sept. 30, 1965, at 2; John M. Goshko, *State Dept. Is Evaluating Castro Offer on Refugees*, Wash. Post, Sept. 30, 1965, at A18. Soon thereafter, Cuban-Americans set sail to Camarioca in hundreds of small boats to pick up their family and friends. Engstrom, at 25. Over the next month, 2,866 undocumented Cubans were brought to the U.S. and processed by INS. *Id.*

Explicitly welcoming the Cuban refugees, who had been labeled "counter-revolutionaries," "worms," and "antisocials" by Castro, the Johnson Administration proposed an "orderly departure" program, setting no limits on the number of entrants the U.S. would accept. Masud-Piloto, 62, 65. On October 3, 1965, in a speech beneath the Statue of Liberty, President Johnson stated:

> I declare this afternoon to the people of Cuba that those who seek refuge here in America will find it. The dedication of America to our tradition as an asylum for the oppressed is going to be upheld.

Remarks at the Signing of the Immigration Bill, 2 Pub. Papers 1040 (Oct. 3, 1965). The following day, the Administration began negotiating with Castro to institute an ongoing airlift to bring Cubans to the United States. Engstrom, at 24; Richard Eder, *Havana Accepts Some U.S. Terms on Refugee Plan*, N.Y. Times, Oct. 14, 1965, at 1.

As negotiations continued, the U.S. attempted to slow the boatlift by threatening civil fines, boat seizures, and imprisonment – partially in response to the physical danger associated with the boatlift. Engstrom, at 25; Masud-Piloto, at 61; Jon Nordheimer & Lee Winfrey, *Exiles Dock in Cuba, Ignore U.S. Warning,* Miami Herald, Oct. 9, 1965, at A1. But these legal sanctions were largely unenforced, as they had been before the boatlift, and failed to serve as a deterrent. Although the Government threatened boat operators, it continued to welcome and accept the Cuban refugees brought in on these boats. Engstrom, at 25. And although the U.S. initially impounded several boats, it returned the boats to their owners a few days later and never fined or prosecuted any of the boat owners. *Id.* at 26 & n.89.

The Johnson Administration finally signed a Memorandum of Understanding with the Cuban government on November 6, which replaced the boatlift with an airlift program that would bring 3,000 to 4,000 Cubans to the U.S. every month. 53 Dep't State Bull. No. 1379, at 850-52 (Nov. 29, 1965); Richard Eder, *U.S. and Castro Agree to Start Refugee Airlift*, N.Y. Times, Nov. 7, 1965, at 1. The U.S. also agreed to institute a sealift to bring over the thousands of Cubans who had been left behind at Camarioca after Castro closed down the port. Engstrom, at 27. Both lifts began on December 1, 1965. *Id.* at 27, 29. The airlifts, known as the "Freedom Flights," would bring over 260,000 Cuban refugees fleeing persecution to the U.S. over the next eight years, making

it the "largest airborne refugee operation in American history." Masud-Piloto, at 68; Engstrom, at 29-30.

Instead of asking Congress for special legislation to admit arriving Cubans, the Administration continued to parole them into the country. Engstrom, at 30; Cong. Research Serv., at 190-91. On September 16, 1965, the Senate Judiciary Committee had reiterated the understanding that parole was meant for individual emergencies and not for "the immigration of classes or groups outside of the law." S. Rep. No. 89-748, at 17 (1965), *reprinted in* 1965 U.S.C.C.A.N. 3328, 3335. But the Administration wanted to ensure that Congress did not limit the number of Cuban refugees allowed to enter or charge their admission against the immigration quotas for Latin America. Engstrom, at 30 & nn.110-13. Parole gave the Administration considerable discretion. In any event, in the first year of the airlift, Congress gave tacit consent to the use of parole for Cuban refugees when it passed the "Cuban Adjustment Act" of 1966, which enabled all Cubans "inspected and admitted or *paroled* into the United States subsequent to January 1, 1959" to apply for permanent residence after two years. Pub. L. No. 89-732, §1, 80 Stat. 1161 (1966) (emphasis added). It was clear that the parole of Cubans was meant to assist resettlement, not serve as temporary release from detention with eventual expiration of that release.

Indeed, like Presidents Eisenhower and Kennedy before him, President Johnson continued to appropriate more and more funds to the resettlement of Cuban refugees. Masud-Piloto, at 66. By the time President Johnson left office in January 1969, the airlift and resettlement programs were costing more than $100 million a year. *Id.* The flights continued for another four years under President Nixon, costing upwards of $120 million when they were unilaterally cancelled by the Cuban government on

April 6, 1973. *Id.* at 66-68; *Nixon Seeks Aid to Cubans*, N.Y. Times, Sept. 7, 1972, at 8.

Moreover, when Castro imposed restrictions on foreign travel without exit permits, the U.S. continued to welcome and parole those who fled Cuba in contravention of Cuban – as well as U.S. – law. Engstrom, at 48-50, 49 n.23, 52. Indeed, during this time the U.S. Government even paroled Cubans who forcibly hijacked vessels from Cuba, in violation of the 1973 Hijacking Treaty. Engstrom, at 48-52; Smith, at 200-02. After each incident, the Cuban government demanded that the U.S. abide by the treaty and prosecute the hijackers. Engstrom, at 48-52. Yet the U.S. paroled the hijackers into the country and refused to arrest or prosecute them, even though at least two of the hijackings involved real danger to the hostages aboard the vessels. Smith, at 200-03; Engstrom, at 48-52. The Cuban government contended that such inaction encouraged illegal departures, as did the unconditional welcome the U.S. gave to all Cubans who arrived by illegal means. Smith, at 201-02; Engstrom, at 52.

III. The Mariel Cubans Are Welcomed by President Carter, Paroled Into the United States as a Step Towards Resettlement, and Treated Like Prior Groups of Refugees.

Like the Cubans who came to the U.S. before them, those who came on the Mariel boatlift in 1980 were in many ways encouraged to come. Unlike President Johnson's actions in the earlier boatlift from Camarioca, President Carter actually enforced the laws against transporting undocumented aliens – after early non-enforcement – in an effort to stop the boatlift. But just as President Johnson had done with Camarioca, President Carter made a speech welcoming the Cubans "with an open heart and open arms;" refused to interdict or return

arriving Cubans; tried to replace the boatlift with a continuing airlift akin to the Freedom Flights of the 1960s and 1970s; and paroled into the country all those who arrived and passed initial screening.

More significantly to this case, when the Government employed parole on behalf of the Mariel Cubans, it did so as a means toward resettlement in the United States. There was no presumption that parole would eventually expire and they would be detained. In fact, they were treated like the refugees who came before them. They were provided with special status; received significant educational and welfare benefits, among other types of resettlement assistance; and were allowed to apply for permanent resident status through the Cuban Adjustment Act and Immigration Reform and Control Act of 1986.

A. The Carter Administration Receives All Cubans Who Depart from the Port of Mariel.

The Mariel Boatlift was triggered by an incident at the Peruvian embassy in Havana. On April 1, 1980, after seven years without legal immigration between the U.S. and Cuba, several Cubans seeking asylum drove a bus through the gates of the Peruvian embassy. Jo Thomas, *Crowd at Havana Embassy Grows; 10,000 Reported Seeking Asylum*, N.Y. Times, Apr. 7, 1980, at A1. Although the Cubans were unarmed, Cuban policemen guarding the embassy opened fire, killing one of their own in the crossfire. *Id.* On April 4, the Cuban government pulled the guards from the embassy and told the public that anyone who could obtain a visa was free to leave the country through the Peruvian embassy. *Id.* Within a few days, over 10,000 Cubans had crowded into the embassy compound. *Id.* Castro immediately alleged that most of the 10,000 were "scum, criminals, lumpen, parasites, and antisocial elements." Smith, at 79.

President Carter responded on April 14, employing for the first time new immigration provisions for the resettlement of refugees, enacted one month earlier by the Refugee Act of 1980. Pub. L. No. 96-212, 94 Stat. 102 (1980). Recognizing that "special circumstances exist[ed]," the President determined that those in the embassy "who otherwise qualify may be considered refugees even though they are still within their country of nationality or habitual residence." Presidential Determination No. 80-16, 45 Fed. Reg. 28079 (Apr. 14, 1980). Further, declaring "that an unforeseen refugee situation exists" the President concluded that "grave humanitarian needs" and the "national interest" justified the admission of up to 3,500 of the refugees and the appropriation of up to $4.25 million "to aid in [their] resettlement." *Id.*

Two days later, on April 16, an airlift was commenced to transport the Cubans who had taken refuge in the Peruvian embassy to Costa Rica for processing. *Cuba Bars Refugee Flights to Costa Rican Staging Area*, N.Y. Times, Apr. 19, 1980, at 6. But the Cuban government abruptly suspended the airlift three days after it began, partly because of adverse international publicity, demanding that the Cubans "be flown directly to the countries where they are to settle and not to a staging area in Costa Rica." *Id.* The Cuban government announced that anyone who wanted to leave the country would now have to do so through the port of Mariel. Engstrom, at 62. On April 21, a number of Cuban-Americans who had sailed to Mariel on April 19 returned to the U.S. with 40 Cuban nationals. *Id.* The boatlift had begun.

In the first days of the boatlift, the U.S. Government appeared uncertain of how to respond. State Department officials warned that the boatlift was illegal, but then withdrew the formal announcement that had been prepared on the issue. *U.S. Officials Warn Against Unauthorized Refugee Trips*, Wash. Post, Apr. 23, 1980, at A21. And

INS District Director Ray Morris, the top immigration official in Miami, told boaters that no crime would be committed if the "regular immigration process" was followed. *Id.* According to Morris, his office was using "normal procedures" in dealing with the "refugees," and so long as "boat captains bringing in Cubans notified immigration officials on arrival," they would be violating no law – "unless, down the line, asylum were refused." *Id.* These announcements were understood as endorsements of the boatlift. Engstrom, at 66.

On April 23, the State Department finally issued an official statement regarding the boatlift, indicating that while it was "deeply sympathetic" with those engaged in the boatlift, it could not "condone this procedure." 80 Dep't State Bull. No. 2039, at 68 (June 1980) (Dep't Statement of Apr. 23, 1980). It instructed boat owners that fines up to $2,000 would be levied for each Cuban they carried, that their boats would be subject to seizure, and that they were subject to imprisonment. *Id.*; John M. Goshko, *State Dept. Seeks to Halt Sealift*, Wash. Post, Apr. 24, 1980, at A1.

Cuban-Americans, however, largely ignored the warnings; the next day the Coast Guard observed approximately 1,000 boats traveling toward Cuba. Engstrom, at 62, 67 (quoting Scheina, at 4). And, as with the Camarioca boatlift, the laws were not fully enforced. Of the first 93 vessels that returned from Mariel with undocumented Cubans during the first 10 days of the boatlift, only 3 were seized. Joseph B. Treaster, *U.S. Seizes 3 Boats With Refugees*, N.Y. Times, Apr. 29, 1980, at A1; Engstrom, at 82. Federal agents issued to each boat "notices of intent to fine" carrying penalties of $1,000 per person transported, but they arrested none of the boat captains. Engstrom, at 82; John M. Crewdson, *Attempt by U.S. to Bar Freighter Apparently Fails*, N.Y. Times, June 3, 1980, at B11.

More significantly, and like the steps taken by President Johnson during the Camarioca boatlift, the Carter Administration decided to push for an orderly and safe departure program and to assist the boatlift in the interim. On April 27, noting that the boatlift was "extraordinarily dangerous and unlawful," the Administration asked Cuban-Americans to refrain from going to Mariel, directed the U.S. Navy and Coast Guard to "render all possible assistance to those at sea," and called on Castro to agree to an "orderly, safe, and humane evacuation of refugees." 80 Dep't State Bull. No. 2039, at 68 (June 1980) (Vice President's Statement of Apr. 27, 1980). At a hearing before the House Judiciary Committee on April 30, Victor H. Palmieri, the State Department's Coordinator for Refugee Affairs, articulated the Administration's position not to interdict those on their way to the U.S.:

> [L]ike scores of first-asylum countries around the world today, we will be generous; we will be sensitive to the basic human desires that motivated [the Cubans'] flight; no boats will be turned away, and no one will be returned to a country where he or she might face persecution.

Charles R. Babcock & Margot Hornblower, *Navy Ships Will Monitor Cuban Boatlift*, Wash. Post, May 1, 1980, at A1. Further, in order to assist the increasing number of Cuban arrivals, the White House on May 2 directed additional resources to process daily flows of 2,500 to 3,000 arrivals, assured screening to remove those with criminal records, expanded the Coast Guard's capability to assist the flotilla, and appropriated money for "resettlement" of the refugees. 80 Dep't State Bull. No. 2039, at 69 (June 1980) (White House Statement of May 2, 1980).

On May 5, President Carter made a speech before the League of Women Voters in which he welcomed Cuban "refugees" to the United States. In response to a question about the increasing problems with illegal immigration,

the President made a number of comments encouraging the continued migration of the Cuban refugees:

> We, as a nation, have always had our arms open to receiving refugees in accordance with American law. . . . We are the most generous nation on Earth in receiving refugees, and I feel very deeply that this commitment should be maintained. . . .
>
> I have organized within the White House . . . a combined group of departments who are working on this special flow of Cuban refugees. In the last few days we have received more than 10,000 from Cuba. . . . [L]iterally tens of thousands of others will be received in our country with understanding, as expeditiously as we can, as safely as possible on their journey across the 90 miles of ocean, and processed in accordance with the law.
>
> . . . [W]e'll continue to provide an open heart and open arms to refugees seeking freedom from Communist domination and from economic deprivation, brought about primarily by Fidel Castro and his government.

President Carter's Speech of May 5, 1980, *reprinted in Fernandez-Roque v. Smith*, 622 F. Supp. 887, 897 n.16. (N.D. Ga. 1985). These remarks were "broadly interpreted as government approval of the boatlift." *Id.* Solidifying the invitation to come to the U.S., the State Department reported that the Administration had discontinued the practice of imposing fines on those who transported Cubans. Steven R. Weisman, *President Says U.S. Offers "Open Arms" to Cuban Refugees; Warm Reception is Promised*, N.Y. Times, May 6, 1980, at A1.

B. The Carter Administration Renews Attempts to Stop the Boatlift and Replace it With a Safe and Orderly Airlift.

By May 14, over 1,000 vessels had returned from Mariel carrying some 40,000 Cubans, and over 1,000 boats were still anchored in Mariel Harbor with the capacity to carry tens of thousands more. Engstrom, at 111; Joseph B. Treaster, *Coast Guard Begins Seizing Vessels*, N.Y. Times, May 15, 1980, at A12. Hundreds of boats had required Coast Guard assistance, and at least seven people had died on the high seas. Engstrom, at 108 n.17; 80 Dep't State Bull. No. 2039, at 70 (June 1980) (President's Statement of May 14, 1980). And there were growing reports that Castro was expelling criminals and the mentally ill to the U.S. through the boatlift.[7] Engstrom, at 111-12. These factors led the Carter Administration to renew its efforts to stop the boatlift and replace it with an orderly and safe departure program.

On May 14, President Carter announced his intention to strengthen law enforcement efforts and replace the boatlift with a government-run airlift and sealift. The President introduced a "program to permit safe and

[7] The Mariel Cubans were screened and processed by INS and Customs officials upon arrival. Those suspected of being criminals or mentally ill were also screened by the FBI, the CIA, and the Department of Defense. Iver Peterson, *For 'Problem' Refugees, the Wait for Freedom Is Tedious*, N.Y. Times, May 21, 1980, at A24. The INS reports that of the 125,000 Mariel Cubans, about 23,000 had criminal records. *U.S. Won't 'Let Another Mariel Happen,'* U.S. News & World Rep., Jan. 16, 1984, at 30. "Of those, 21,000 were involved in very minor misdemeanors or, in many cases, political kinds of crimes that would not be crimes in the U.S." *Id.*; Charles Oliver, *Another Influx of Marielitos? Data Shows Cubans in 1980 Boatlift Assimilated*, Investor's Bus. Daily, Sept. 23, 1994, at A1. Some 1,800 Mariel Cubans were detained on arrival and refused parole. *Fernandez-Roque*, 622 F. Supp. at 895 n.11.

orderly passage from Cuba," intending "to end Cuba's inhumane actions and to bring safety and order to a process that continues to threaten lives." 80 Dep't State Bull. No. 2039, at 70 (June 1980) (President's Statement of May 14, 1980). According to a White House statement later that day, the Government was chartering two large ships ready to go to Cuba and would "welcome the Cuban refugees in a legal and orderly process." *Id.* at 71 (White House Statement of May 14, 1980).

The following day, as negotiations continued with the Cuban government, federal officials began to fine and seize the boats of those who transported undocumented Cubans. By May 30, they had seized over 700 boats, though by that time over 89,000 Cubans had already arrived in the United States. Nathaniel Sheppard Jr., *Fishing Craft Used to Aid Cubans Will Be Released by U.S. Officials*, N.Y. Times, May 31, 1980, at 6. Cubans continued to arrive, but the number of boats embarking to Cuba dropped significantly. Engstrom, at 111, 113.

C. The Government Paroles the Cuban Arrivals Into the Country as a Step Toward Permanent Residency.

As Cubans continued to arrive from Mariel, U.S. officials considered their immigration status. Technically, the Government had been allowing them into the country for 60 days under parole, but the publicly stated assumption of Government officials was that the Cubans were here to stay and that provisions would be made for permanent residency. Robert Pear, *Carter Orders Move to Expel Criminals Among the Refugees*, N.Y. Times, June 8, 1980, at A1 ("The Cubans have been allowed in temporarily for 60 days under the Attorney General's 'parole' power, while the Government tries to decide what their legal status should be. It is widely accepted among Federal

officials concerned with the problem that most of the Cubans will be allowed to stay here under one legal theory or another."). *See also* Robert Pear, *Carter and Congress to Discuss Status of Refugees*, N.Y. Times, June 4, 1980, at A18 ("Two assumptions shared by most officials supervising refugee resettlement are that virtually all the Cubans will stay in the United States and that the Federal Government will eventually subsidize generous benefits for them.").

The question of what status to grant Mariel Cubans, however, was complicated by a few factors. The Refugee Act of 1980, enacted on March 17, had created permanent provisions for admitting refugees. Among other things, the Act limited to 50,000 the number of refugees the President could accept without consulting Congress. Pub. L. No. 96-212, § 207, 94 Stat. 102, 103. It also prohibited the use of parole on behalf of refugees unless it was determined that "compelling reasons in the public interest with respect to that particular alien" required parole rather than admission as a refugee. *Id.* at § 203(f)(3)(B), 94 Stat. at 108. Further, thousands of Haitians had migrated to the U.S. during the last decade, and President Carter was faced with strong criticism for what was perceived to be preferential treatment for Cubans. Engstrom, at 108 & n.22, 144-45 & n.43; *Double Standard for Cuban, Haitian Refugees?*, U.S. News & World Rep., May 5, 1980, at 42. To avoid this criticism, he decided that any decision on the status of Cuban arrivals would apply equally to Haitians. Engstrom, at 85 n.148, 139, 145-46.

For the first few weeks of the boatlift, the Administration had referred to the Mariel Cubans as refugees and considered dealing with them under the new provision for refugee admissions – section 207 of the INA – just as it

had done for those who took refuge at the Peruvian embassy.[8] Engstrom, at 148-54. But because section 207 allowed the President only 50,000 admissions, he would have been forced to consult with Congress and present detailed studies regarding the social, economic, and demographic impact of resettlement. Pub. L. No. 96-212, §§ 207(b) & (e), 94 Stat. 102, 103-04. This raised concerns that the Cubans would be counted against the refugee quotas, which would limit the number of Cubans allowed to stay and adversely affect potential refugees from other countries. Robert Pear, *President to Treat Cubans as Applicants for Asylum*, N.Y. Times, May 21, 1980, at A24.

Also, for years the U.S. had labeled arriving Haitians as economic migrants and refused to consider them refugees. Engstrom, at 145, 148; Robert Pear, *President to Treat Cubans as Applicants for Asylum*, N.Y. Times, May 21, 1980, at A24. Thus, while classifying the Cubans as refugees meant merely continuing an established tradition, to do the same for Haitians meant an abrupt break with policy. Engstrom, at 145, 152-53. And because the U.S. had generally considered Haitians not to have credible claims of persecution, giving them refugee status would have gutted the Refugee Act of its political persecution test and created dangerous precedent. Engstrom, at 145, 147-48, 153-54. Doris Meissner, Deputy Assistant

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[8] The Refugee Act of 1980 for the first time defined the term "refugee" for use in the INA. Pub L. No. 96-212, § 201(a), 94 Stat. 102 (codified at 8 U.S.C. § 1101(a)(42)). It was defined, as it had been used earlier, to mean a person outside her country of nationality or last habitual residence who is unable to return "because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion." *Id.* The new definition also allowed the President to designate persons still within their country of nationality as refugees after consulting with Congress. *Id.*

Attorney General at the time, later explained that the policy of equal treatment for Cubans and Haitians prevented the Administration from classifying Cubans as refugees under the Act:

> If this had just been Cubans, I don't think there would have been much question that we would have done what we had always done and that is designate them as refugees. But I don't think we would have much question in our minds and I'd be very surprised if we even would have really debated their status. We would have certainly found a way under the Refugee Act either under section 207 or 208, and I think it could have gone either way, to designate them as refugees. But it is the Haitians that created the turf test.

Engstrom, at 147 (interview of Oct. 20, 1989).

To circumvent these issues, the Administration on May 20 initially decided to classify the Mariel Cubans as applicants for asylum, not as refugees, "thus giving the President greater discretionary authority as to how many would be admitted to live in the United States." Robert Pear, *President to Treat Cubans as Applicants for Asylum*, N.Y. Times, May 21, 1980, at A24. Administration officials specifically noted that because they were not classified as refugees, "there was no need to consult with Congress to set the number ultimately admitted." *Id.* The Administration had "created a separate category for them with no numerical limit." *Id.*

Considering them as asylum applicants, however, was no long-term solution. It would have taken the Administration years, if not decades, to process 125,000 asylum applications on a case-by-case basis. *Id.*; Engstrom, at 155. Because asylum grants were also based on the refugee provision's persecution test, Cubans were much more likely than Haitians to obtain asylum, thereby resulting in the disparity the Administration wanted to avoid. Engstrom, at

155. And until their asylum applications were ruled on, they would not qualify for any federal benefits. *Id.*

Thus, on June 20, the Carter Administration issued a policy statement reclassifying Cubans who had arrived between April 21 and June 19, as well as Haitians in INS proceedings as of June 19, as "Cuban/Haitian Entrants (status pending)." *Text of State Dept. Statement on a Refugee Policy*, N.Y. Times, June 21, 1980, at 8. According to the statement, the Administration would submit legislation to Congress "as soon as possible" to "[e]stablish a 'Cuban-Haitian Entrant' status for recently arrived Cubans and Haitians;" provide federal benefits and emergency assistance to the entrants; and "provide for conversion to permanent resident status after two years." *Id.* The Administration extended its use of parole "to give Congress time to enact [the] special legislation." Robert Pear, *U.S. to Let Refugees from Cuba and Haiti Remain for 6 Months*, N.Y. Times, June 21, 1980, at 1. That same day, in a State Department press briefing, Coordinator for Refugee Affairs Victor Palmieri added, "These people for the most part are here to stay. I believe this Congress will regularize their status in due time." *Id.*

D. The Government Takes Measures to Facilitate the Permanent Resettlement of the Mariel Cubans, Like That of Earlier Groups of Refugees.

On September 28, 1980, the Cuban Government closed the Port of Mariel and unilaterally ended the boatlift. Steven R. Weisman, *Havana Government Unilaterally Cuts Off Refugee Boat Exodus*, N.Y. Times, Sept. 27, 1980, at A1. Negotiations to replace the Mariel boatlift with a U.S.-run airlift continued into January of 1981, but the Cuban government decided to wait until after the inauguration of President Reagan to finish the accord.

Engstrom, at 184. The Reagan Administration, however, did not resume talks with the Cuban government, and the agreement stalled. *Id.*

Meanwhile, the Cubans who arrived and were paroled into the country, although provided with entrant classification, were in many ways treated like refugees. For example, to facilitate resettlement President Carter appropriated over $31 million in funds from the U.S. Emergency Refugee and Migration Assistance Fund on September 21 "for the purposes of processing, transporting, caring, and resettling" Cubans and Haitians. Pres. Determination No. 80-27, 45 Fed. Reg. 65,993 (Sept. 21, 1980). He also made the Cubans and Haitians in parole status prior to June 19 eligible for Aid to Families with Dependent Children (AFDC), Supplemental Security Income (SSI), and Medicaid. *Text of State Dept. Statement on a Refugee Policy*, N.Y. Times, June 21, 1980, at 8; Engstrom, at 162. In addition, like designated refugees, both Cubans and Haitians were granted work authorization. Engstrom, at 140-141.

On October 10, Congress enacted the Refugee Education Assistance Act of 1980 (REAA), which explicitly granted the services and benefits available to refugees under the Refugee Act "in the same manner and to the same extent" to Cuban and Haitian entrants. Pub. L. No. 96-422, § 501(b), 94 Stat. 1799, 1809 (1980). Congress also authorized $100 million in resettlement aid and provided for three years of funding to state educational agencies to assist in the education of the refugees' children. *Id.* at §§ 201-501, 94 Stat. at 1801-10. In the House debate on the Act, both supporters and opponents of the legislation assumed the entrants would remain in the U.S. permanently. Congressman Danielson stated that although their status had not yet "been fixed as a matter of law," the entrants were "the guests of the United States and therefore the United States should pay for the cost of assimilating

them and not the local taxpayers." 126 Cong. Rec. H28471 (daily ed. Sept. 30, 1980). Congressman Pepper added: "These children presumably are going to be with us the rest of their lives. They are a part of America." *Id.*

Further, within a few years, the Cuban parolees – though not the Haitian parolees – were adjusting to permanent resident status. Because the Cuban Adjustment Act specifically addressed Cubans "paroled" into the country, Mariel Cubans were eligible to apply for adjustment of status after one year's residence.[9] The INS accepted applications under the Act but did not process them pending enactment of special legislation that had been introduced in Congress. Robert Pear, *Cuban Aliens, But Not Haitians, Will Be Offered Residency Status*, N.Y. Times, Feb. 12, 1984, at A1. When the legislation stalled, the Reagan Administration authorized the INS to resume the processing of the applications. *Id.*; Registration of Mariel Cubans, 49 Fed. Reg. 46,212 (Nov. 23, 1984). By the end of 1987 some 84,000 Mariel Cubans had become permanent residents. Engstrom, at 187.

With passage of the Immigration Reform and Control Act of 1986 (IRCA), Congress provided all Cuban-Haitian Entrants the legal means to adjust their immigration status outside the INA's numerical limitations. Pub. L. No. 99-603, § 202, 100 Stat. 3359, 3404 (1986). The House Committee Report on IRCA noted that both the House and Senate:

> recogniz[ed] the inappropriateness of continuing parole for a group of people who are permanently residing in the United States under color of law

[9] The Refugee Act of 1980 had amended the Cuban Adjustment Act's residency requirement from two years to one. Pub. L. No. 96-212 at § 203(i), 94 Stat. at 108.

> and realiz[ed] that the interests of the United States would best be served if Cuban-Haitian Entrants were allowed to apply for lawful permanent residency in the United States[.]

H.R. Rep. No. 99-682(I), at 75 (1986). Agreeing that IRCA was "intended to remedy well documented wrongs and inequities, and to fulfill specific promises of two successive administrations," the Committee members concluded by stating their belief "that it is time Cuban/Haitian Entrants are granted a status that is consistent with the reality of their permanent residency in the United States." *Id.* at 76. Just as parole had been used to admit and resettle Cubans and other refugees, parole was used as a legal mechanism to allow Mariel Cubans entry into the United States and provide a first step towards permanent resettlement.

CONCLUSION

For the foregoing reasons, the Court should reverse the decision of the court below.

Respectfully submitted,

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APPENDIX A

The Florida Immigrant Advocacy Center (FIAC) is a nonprofit legal services organization dedicated to promoting the basic human rights of immigrants and refugees of all nationalities. FIAC's attorneys have represented thousands of immigrants and refugees, including Mariel Cubans, many of whom have been indefinitely detained. FIAC is thus extremely concerned with the issue of indefinite detention, especially as it relates to Mariel Cubans and other refugees and displaced persons who entered the United States on parole. FIAC submits this brief to make the Court aware of the historical use of parole on behalf of refugees and the history of Cuban emigration to the United States both before and during the Mariel boatlift.

Rafael Peñalver is a Cuban-American attorney and community activist in Miami, Florida. He has served as Chairman of the State of Florida Commission on Hispanic Affairs and is the current President of the San Carlos Institute, a Cuban cultural and education center, founded in 1871 by Cuban exiles and dedicated to the preservation and promotion of Cuban traditions, values and democratic ideals. For the last twenty years, Mr. Peñalver has been deeply committed to fighting the indefinite detention of noncitizens by the federal government, especially the indefinite detention of Mariel Cubans. He has testified in both the Senate and the House of Representatives on the issue of indefinite detention, and he received a special commendation in 1988 from the Florida Supreme Court for his pro bono work on behalf of Mariel Cuban detainees.